IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE NO. 269 OF 1995

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the Civil Judge?

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M/S. DEEPAK CONSTRUCTION COMPANY - Applicant(s)
Versus
COMMISSIONER OF INCOME TAX - Opponent(s)

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Appearance :
MR. S.N. DIVETIA for Applicant(s).
MR. B.B. NAIK for Opponent(s).

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG
and
HONOURABLE MR.JUSTICE M.R. SHAH

Date : 23/08/2006

ORAL JUDGMENT
(Per : HONOURABLE MR.JUSTICE R.S.GARG)

The Income-Tax Appellate Tribunal, Ahmedabad Bench `A', at the instance of the Assessee, has referred

the following question for the opinion of this Court in I.T. Appeal No.163/Ahd/1990 relating to the Assessment Year 1983-84:

> *"Whether, on the facts and in the circumstances of the case, the Tribunal was right in confirming the levy of penalty of Rs.67,002/- u/s. 271(1)(c)?"*

2. The short facts necessary for disposal of the present Reference are that the Assessee-Firm, which is engaged in the activity of construction of work, submitted a return of income, declaring the total income of Rs.1,27,824=00 on 30th October, 1984. The assessment could not be completed upto October-1985. The Assessing Officer issued a notice to show cause to the Assessee on 24th February, 1986 requiring the Assessee to make compliance by 5th March, 1986. The said show cause notice has been reproduced in verbatim in the Assessment Order dated 31.03.1986, the show cause notice was also relating to the squared up cash credits, which were listed in tabular form in the said Assessment Order. Such squared up cash credits were detailed in the show cause notice. After the service of the notice to show cause, the Assessee filed a revised return on 7th March, 1986,

declaring the total income to the tune of Rs.2,27,824=00, which included a sum of Rs.1 Lakh in addition to the earlier income. Before the Assessing Officer, the benefit of Amnesty Scheme was also claimed to avoid the liability of penalty proceedings under Section-271(1)(c) of the Income Tax Act ("the Act" for short).

The Assessing Officer accepted the revised return and assessed the present Assessee for the sum of Rs.2,27,824=00, but, opened penalty proceedings under Section-271(1)(c) of the Act. The Assessee, *vide* its reply dated 4th November, 1986, stated that the Firm had filed the return for the Accounting Years 1983-84 to 1985-86 in terms of the circulars of the Central Board of Direct Taxes (C.B.D.T.) and, therefore, he was entitled to immunity and the penalty could not be levied. The explanation offered by the Assessee was not palatable to the Officer, therefore, he levied the minimum penalty of Rs.67,002/- only by his Order dated 30th March, 1988. The Assessee, being aggrieved by the said order, took up the matter in appeal to the Commissioner of Income Tax (Appeals), on dismissal of the same the matter was brought before the Tribunal. As the Tribunal rejected the submissions made by the Assessee, the Assessee made an application under Section-256(1) of the Act for a

reference to the High Court. Accordingly, on the aforesaid question, the reference has been made.

3. Mr.Divetia, learned Counsel for the Assessee, submits that from Circular No.450 dated 13th February, 1986 issued by the C.B.D.T., it would clearly appear that the Government wanted to realise maximum tax and therefore, it provided certain benefits and protection to the Assessees if they were to file the revised returns or were to disclose their income honestly. Referring to Circular No.451 dated 17th February, 1986, specially, to Question Nos. 4, 19 and 30, it was submitted that the explanations offered by the C.B.D.T. in the said circular, would provide a solace to the Assessee and the penalty proceedings deserve to be quashed.

4. On the other hand, Mr.B.B.Naik, learned Counsel for the Revenue, submits that a fair understanding of Circular Nos.450 and 451 would make it clear that protection is provided to an honest tax-payer or to a person, who voluntary comes up for making the payment of the tax, and not to a person who, after being cornered on detection of suppression of the income, starts blowing trumpet of honesty. He submits that in the present case, the Assessee did not file the revised return of his own

to show his honesty, but, had submitted the revised return after the service of the notice to show cause. He also submits that there would be a distinction between the word `detection' and `determination' and in this case, the detection stands proved prior to filing of the revised return and, therefore, the determination, at a subsequent stage, would not change the factual scenario.

5. To appreciate the rival contentions of the parties, we would firstly reproduce Question Nos.4, 19 and 30 with their respective answers:

> *"**Question No.4**. **-** The income-tax circulars are not very clear as to whether the immunity from penalty and prosecution is guaranteed to the assessee unlike the circular in respect of wealth-tax which appears to be clear on this point?*
> ***Answer. -** The immunity from penalty and prosecution applies in all cases whether of income-tax or of wealth-tax where the assessee admits the truth and pays taxes properly.*
>
> ***Question No. 19.** - Kindly clarify the expression "before detection by the department"?*
> ***Answer.-** If the Income-tax Officer has already found material to show that there has been concealment, that would mean the Department has detected the concealment. If the Income-tax*

Officer only had prima facie belief, that would not mean concealment has been detected.

Question No.30. *– Whether an assessee could make a declaration in respect of assets or income which is not the subject-matter of seizure?*
Answer.- *Yes, if it has not been already found out in the course of the search."*

Reply to Question No.4 simply said that the immunity from penalty and prosecution applies in all cases whether of income-tax or of wealth-tax where the assessee admits the truth and pays the taxes properly. Question No.19 and its answer by the C.B.D.T. would make it clear that the expression "before detection by the department" would simply mean that if the Income-tax Officer has already found material to show that there has been concealment, that would mean the Department has detected the concealment. The further explanation was that if the Income-tax Officer only had *prima facie* belief, that would not mean concealment has been detected.

In reply to Question No.30, the C.B.D.T. simply said that the Assessee could make a declaration in respect of assets or income which was not the subject matter of seizure if it has not been already found out in

the course of search. Thrust of the C.B.D.T. was that the facts have not been detected nor suppression has been detected nor some material has been brought on record, the Assessee would be entitled to make a declaration in respect of the assets or income, which is not the subject matter of seizure if it has not been already found in the course of search. Question No.30, in fact, related to search, while Question No.19 related to interpretation of the words “before detection by the department”.

6. A perusal of the notice dated 24th February, 1986 would show that the Assessing Officer had already detected concealment of the income. He had made the following observations: “on scrutiny of squared up accounts and details filed by you it is noticed that following new deposits have been received and paid back by you during the accounting year itself”. He also observed that, “detailed scrutiny of above data makes it crystal clear that you have introduced unaccounted money on various dates as under and taken out of books before close of the Accounting Year”. He lastly observed that, “I intend to add this cash credit of Rs.1,64,500/- to the income disclosed by you, as income from undisclosed sources”.

From the above referred observations made by the Assessing Officer, it would precipitate on the records that the concealment of income was already detected, but, before determining the additional income for the purposes of tax, the Assessment Officer, in accordance with the provisions of the Act and the principles of natural justice, was requiring the Assessee to prove the genuineness of all the deposits by 3rd March, 1986, he required certain particulars and details.

7. After this notice dated 24th February, 1986 was served upon the Assessee, he came out of his slumber, started acting honest and submitted the revised return. It is not the case of the Assessee either before the Assessing Officer or before the Tribunal that much before service of the show cause notice, honesty prevailed upon him and to the call of good conscience, he filed the revised return. The revised return, in fact, was a reaction to the notice issued by the Assessing Officer on 24th February, 1986.

8. At this stage, we will be failing in our duty if we do not refer to yet another argument of Mr.Divetia. He submits that the notice to show cause was in relation to the sum of Rs.1,64,500/-, but, without any further

explanation from the Assessee, the Assessing Officer relied upon the revised return and added the sum of Rs.1 Lakh only. He submits that if that be so, it must be held that nothing was detected before the final order was made.

9. The submission of the learned Counsel for the Assessee runs contrary to the answer to Question No.19, the argument virtually violates the true spirit of the said Circular. The Circular said that “before detection by the department”, which would simply mean that if the Income-tax Officer has not found any material to show that there has been concealment and he only has a *prima facie* belief, then, that would not be a detection. The Circular does not say that after the concealment is detected and a notice is issued, then too, filing of the revised return would amount to filing the return in accordance with the Amnesty Scheme and the detection of the facts would stand washed away.

10. One must not forget that detection of the fact and determination of the fact stand on different pedestal. The detection may lead to certain proceedings and the determination would amount to a finding. In the present case, the Income-tax Officer had already detected

concealment of the income, but, before determining the amount finally, he issued a notice to show cause to the Assessee to prove the genuineness of the alleged transactions. The detection led to the notice and the service of the notice led to the filing of the revised return, the revised return led to the determination. Therefore, the detection cannot be put at par with the determination.

11. Mr. Divetia, learned Counsel for the Assessee, placed his strong reliance upon a judgement of the Calcutta High Court reported in ***211 ITR 563*** in the matter of ***Anand Kumar Saraf & Ors. vs. Commissioner of Income-Tax & Ors***. In the said matter, a search was conducted in the assessee's premises; before the scrutiny of the documents so seized by the authorities, the revised return disclosing his income and wealth, was filed and payment of tax was made in time. The High Court found that the Assessee was entitled to the benefits of Amnesty Scheme. On page-574 of the judgement, the High Court made the following observations:

> *"The mere stigma of search and seizure cannot shut out the assessee from the amnesty. The scheme is an inducement to evaders to make a clean breast of past evasions and square up*

accounts with the Revenue. The persons who are left out from this opportunity are those whose concealments have come to light beforehand by investigations and search and seizure operations carried out by the Revenue. The clarifications of the Board in its answer to question No. 19 as to the meaning of the expression `before detection by the Department' show that if the assessing authority has a prima facie belief that would not mean detection. The dictionary meaning of the word `detect' is `to discover the true especially hidden or disguised character' or `to discover or determine the existence, presence or fact' (see Webster's Third New International Dictionary, 1976 edition). In the instant case, certain documents and papers were seized. They might or might not reveal concealment. Even the seizure could not lead to a prima facie belief as to concealment as the contents, purport and the implications of the documents were yet to be gone into. Therefore, at the point of time the return under the amnesty scheme was filed, the Assessing Officer admittedly had no idea as to whether the seized papers would reveal any concealment. The mere fact that the petitioner-appellant's case was awaiting a probe with reference to his past records as well as extrinsic sources could not lead to his ouster from the scope of the scheme."

The learned Counsel for the Assessee vehemently argued that nothing was detected in the present matter,

therefore, and as the revised return was relied upon by the Assessing Officer, no penalty proceedings could be initiated.

12. The facts of the said case were totally different. The law laid down by the judgement is in reference to the facts. Stray sentences cannot be read out out of context. In the said matter, before any action could be taken by the Department on the material obtained by it in the process of search and seizure, wisdom dawned upon the Assessee and he filed the revised return and paid the tax in time. The High Court observed that one could not be sure that the seized material would lead to any detection of the undisclosed income or wealth and as nothing could be detected before scrutiny of the seized material, there was no detection. The High Court, placing its reliance upon the dictionary meaning of the word “detect”, observed that the word “detect” would mean “to discover the true especially hidden or disguised character” or would mean “to discover or determine the existence, presence or fact”. If the very same dictionary meaning is applied to the facts of the present case, it would clearly appear that much before issuing the notice to show cause to the Assessee, the facts were already detected. Hidden or disguised character of the income was

already discovered and the Department had already discovered or detected the existence and presence of a particular fact. The Assessing Officer had already held even before issuing the notice that the return was not reflecting the income correctly and there was concealment. On perusal of the notice to show cause, it would clearly appear that the Assessing Officer had already decided the question that there was concealment of the income, but, before the final determination, he wanted to give an opportunity to the Assessee to satisfy the authority in relation to the genuineness of the said entries. Acceptance of the revised return without much ado would not mean that the Department had not detected the concealment. In the present case, the detection of concealment led to the notice to show cause and service of show cause notice upon the Assessee, even for the sake of repetition we would say, led to filing of the revised return.

13. Taking into consideration that the detection was much before the filing of the revised return, we cannot hold that the Assessee would be entitled to any benefits of the amnesty scheme.

14. It is also to be noted that after the

submission of the revised return, on 7th March, 1986, the Assessee submitted the revised return and on 18th March, he filed the reply to the notice to show cause and prior thereto, he had submitted his explanation on 10th March, 1986. It is to be seen from paragraph-3 of the Assessment Order wherein the Assessing Officer has observed that prior to submission of the revised return, in letter dated 30th March, 1986, the Assessee explained the reasons as to why he disclosed the income. The Assessing Officer accepted the said contention and computed the income as per the revised return, but, that does not mean that the concealment was not detected.

15. Taking into consideration the totality of the circumstances and the conduct exhibited by the Assessee, we are of the opinion that the subordinate Tribunals were not unjustified in initiating the penalty proceedings under Section-271(1)(c) of the Act and imposing the penalty. The question is answered against the interest of the Assessee and in favour of the Revenue. The Reference is disposed of with costs of Rs.10,000/- payable by the Assessee to the Revenue.

[***R.S.Garg, J.***]

[***M. R. Shah, J.***]

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